(5)

No. 99-1490

Supreme Court, U.S.
FILED
MAY 24 2000
CLERK

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF STATE AND LOCAL GOVERNMENT PARTIES

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
Counsel of Record
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

A. THE STATE'S PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE COURT BELOW AND THE SOUTH DAKOTA SUPREME COURT AND FURTHERMORE TO RESOLVE THE CONFLICT OF THE COURT BELOW WITH *DECOTEAU* AND *YANKTON SIOUX TRIBE* 2

B. THIS CASE HAS IMPORTANT PRACTICAL AND JURISPRUDENTIAL IMPLICATIONS ... 6

C. THE ISSUE IS RIPE FOR REVIEW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999) . . 1, 2, 3, 4

DeCoteau v. District County Court, 420 U.S. 425 (1975) 1, 2, 3, 4, 5, 6

Hagen v. Utah, 510 U.S. 399 (1994) 2

Solem v. Bartlett, 465 U.S. 463 (1984) 6, 8

South Dakota v. Bourland, 508 U.S. 679 (1993) 7

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 1, 3, 4, 5, 6

United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, No. 99-1174 (May 15, 2000) 9

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998) 9

Yankton Sioux Tribe v. Gaffey, 99 F.3d 1439 (8th Cir. 1996) 1

STATUTORY REFERENCES:

18 U.S.C. § 1151(a) 4, 8, 9

18 U.S.C. § 1151(c) 4, 8

25 U.S.C. § 467 9

OTHER AUTHORITY:

S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894) 6

INTRODUCTION

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and later cases, this Court derived and relied upon clear guidelines for determining the status of reservations following the allotment and cession of reservation land in the late Nineteenth Century. The court of appeals in its first hearing of this matter essentially disregarded those guidelines, *see Yankton Sioux Tribe v. Gaffey*, 99 F.3d 1439 (8th Cir. 1996), but this Court, in overturning that decision, affirmed their vitality. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-44 (1998).

Once again, however, on remand from this Court, the Eighth Circuit has ignored those guidelines and turned the disestablishment inquiry into an ad hoc effort, the results of which conflict with the South Dakota Supreme Court's rulings. The submissions of the United States and the Tribe only confirm how strongly review by this Court is warranted. The United States concedes that the Eighth Circuit "did not articulate its rationale" for its principal holding (U.S. Brief in Opp. 20) and advances wholly new justifications for that holding. Likewise, the Tribe crafts a theory for the Eighth Circuit's holding nowhere to be found in the decision below. Tribe Brief in Opp. 14. Simply put, the Eighth Circuit's decision is incoherent, is in conflict with *DeCoteau*, and is in conflict with the South Dakota Supreme Court's decision in *Bruguier v. Class*, 599 N.W.2d 364 (1999). App. 141. This Court should not let that result stand.

A. THE STATE'S PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE COURT BELOW AND THE SOUTH DAKOTA SUPREME COURT AND FURTHERMORE TO RESOLVE THE CONFLICT OF THE COURT BELOW WITH *DECOTEAU* AND *YANKTON SIOUX TRIBE*

1. The Decision Below Conflicts With the Decision of the South Dakota Supreme Court in *Bruguier v. Class*

The court below unabashedly refused to find the Yankton reservation to be terminated or disestablished. App. 47. In contrast, the South Dakota Supreme Court in *Bruguier v. Class*, App. 171, found "the Yankton Sioux Reservation [to be] effectively terminated by the 1894 Act." A conflict is clearly created. The United States and the Tribe, however, appear to assert that the *Bruguier* language was mere casual dictum. This is belied by *Bruguier* itself.

For example, *Bruguier*, App. 169, carefully analyzed this Court's opinion in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), which found the Lake Traverse reservation to be disestablished, and concluded that there was no "jural distinction" between the two cases. The South Dakota Supreme Court likewise noted that *DeCoteau* had found a congressional intent to "terminate" the reservation. App. 170. The South Dakota Court found "the same intent . . . in the Yankton Reservation sale." App. 170-71. *See also Bruguier*, App. 169, (to hold reservation "not terminated" would contradict "legal conception" of both Indians and non-Indians and defeat " 'justifiable expectations' " of people living in the area) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)). There can be no real doubt that the South Dakota Supreme Court would reject, out of

hand, the suggestion that it had not determined the disestablishment question in a way contrary to the Eighth Circuit Court of Appeals.

The United States admitted as much just a few months ago. On February 25, 2000, the Solicitor General told this Court:

> The defendants sought rehearing to challenge the panel's holding that the Reservation was not *wholly disestablished*, a conclusion that had recently been reached by the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (1999).

"Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit," *United States v. Matt Gaffey*, No. A-___, p. 5 n.1 (emphasis added). Thus, the Solicitor General conceded that the Supreme Court of South Dakota had found that the Yankton reservation was "wholly disestablished," *id.*, and that the decision conflicted with that of the court of appeals.

Similarly, the Tribe filed its own "Application for Extension of Time . . . " on March 3, 2000, in which it, like the United States, conceded that the Supreme Court of South Dakota had found the Yankton Reservation "wholly disestablished." *Id.* at 4 n.1. And, like the United States, it now argues a contrary position.

2. The Opinion of the Court Below Is in Conflict With *DeCoteau v. District County Court* Which *South Dakota v. Yankton Sioux Tribe* Held to Be Squarely On Point.

Yankton Sioux Tribe effectively held *DeCoteau v. District County Court* to be squarely on point. In particular, *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *DeCoteau*, 420 U.S. at 445), held that the " 'cession' and 'sum certain'

language" of Articles I and II of the Yankton Agreement "is 'precisely suited' to terminating reservation status." This Court continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*.

Id. After *Yankton*, only the most weighty evidence should have been able to persuade a court that the Yankton reservation, like the Lake Traverse reservation, was not terminated.

But the court below, along with the United States[1] and Tribe, each ignore the holding of this Court that the language of the Yankton Agreement is " 'precisely suited' " to termination; each likewise ignores the disestablishment guidelines set out in *DeCoteau* and *Yankton Sioux Tribe*. As a result, the court below, App. 28-30, 32-43, the United States, U.S. Brief in Opp. 10-13, 19-22, and the Tribe, Tribe's Brief in Opp. 13-15, have each posited their own ad hoc approach to disestablishment, approaches

---

[1] The United States also spins a theory that the South Dakota Supreme Court believed that certain lands taken into trust were "Indian country" because they were "informal" reservations under 18 U.S.C. 1151(a). U.S. Brief in Opp. 16. Nothing in *Bruguier* supports this theory. Rather, *Bruguier* carefully defines and relies upon the 18 U.S.C. § 1151 subcategories, citing extensive authority of this Court, App. 153-55 n.13, with no indication that an "informal reservation" theory was being considered. The Court recognized, of course, that "Indian country" in the form of unextinguished allotments, *see* 18 U.S.C. § 1151(c), might still exist. *See Bruguier*, App. 153 (question is whether allotments are "part of a permanent reservation under 18 U.S.C. § 1151(a), *or* whether *only* those allotments still held in Indian hands are Indian country under 18 U.S.C. § 1151(c)" (emphasis added)).

which are not consistent, which will not lead to predictable results, and which surely defy the rulings of this Court.

This ad hoc approach is highlighted by the admission of the United States that the court below made but one "definitive ruling with respect to trust lands," i.e., that the former agency lands constitute a "reservation" but the court "*did not articulate its rationale for that determination.*" U.S. Brief in Opp. 20 (emphasis added).

Instead of following this Court's finding that *DeCoteau* controls this case, the court below and the parties have attempted to distinguish *DeCoteau*. This effort necessarily fails, for the reasons set forth above, and additionally on the merits. First, neither the Tribe nor the United States has made even a cursory attempt to overcome the eighteen points of identity between the Yankton and DeCoteau Agreement set out in State's Pet. at 16 n.6. Second, the characteristics claimed to distinguish the situations do not in fact do so.

For example, each argues that the Indians at Lake Traverse expressed a desire to terminate their reservation, but the Yankton Indians did not. This distinction cannot be sustained in light of the language of the Yankton Agreement, the best source of the parties' intentions, which this Court has found to be " 'precisely suited' " to "terminating" the reservation. Moreover, this Court found in *Yankton* that the report of the Commissioners "signaled their understanding that cession of the surplus land *dissolved tribal governance of the 1858 reservation.*" 522 U.S. at 353. (emphasis added). This Court in addition relied upon the language of a letter of three Yankton chiefs and more than a hundred members of the tribe to the effect that they wanted the laws of the " 'State we live in to be recognized and observed,' " a concept indicating

a clear desire to terminate the reservation. *Id. quoting* S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894).

Both the United States and the Tribe likewise attempt to find differences in the Yankton and Lake Traverse agreements other than in the critical "cession and sum certain" articles. As set out more fully in the State's Brief in Opp. in No. 99-1490, these articles in fact *strengthen* the case for disestablishment at Yankton, in that they tie the remaining federal interest to the 25-year allotment period. Thus, the United States' interest would remain only for that 25-year period – the period of the trust allotment – and not permanently, as in the case of "reservation."

B. THIS CASE HAS IMPORTANT PRACTICAL AND JURISPRUDENTIAL IMPLICATIONS

1. Reaffirmation of the Disestablishment Guidelines Set Out in This Court's Decisions Is Critical

Based on *DeCoteau* and prior decisions, this Court announced in *Solem v. Bartlett* that it had established a "fairly clean analytical structure" for analyzing surplus land acts. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). That structure was reemphasized in *Yankton Sioux Tribe*, 522 U.S. at 343-44. The approach focuses primarily, though not exclusively, on the " 'statutory language used to open the Indian lands,' " *id.* at 344, and has the virtue of providing predictability to those who live in areas which might be argued to be "reservations." The sea change in jurisdictional arrangements which follows the designation of an area as a "reservation" only emphasizes the importance of that predictability.

The decision of the court below, however, essentially jettisons the finely tuned rules of this Court and substitutes an ad hoc analysis which avoids the most critical language of the agreement, *see, e.g.*, App. 33, and is based instead on a largely subjective analysis of what the negotiators and the tribal members might have been thinking and of the perceived historical context. *See, e.g.*, App. 28-30, 32-43. It is, quite frankly, impossible to determine how a future court might apply the "rule" of the opinion below, and, indeed, the court of appeals could not state a rationale for the lands it did declare to be a "reservation." U.S. Brief in Opp. 20. The grant of certiorari is of great importance to the states of the Eighth Circuit to provide certainty in the determination of the prime dispute in Indian law – does a reservation exist or not?

2. This Case Is Important to the State of South Dakota

Tribal Petitioners ask this Court to ignore the important questions raised by this case because, they claim, the amount of land is "small" and is found in "remote, sparsely populated areas." Tribe Brief in Opp. 19. The State rejects that characterization. The former reservation is a part of southeastern South Dakota which bordered on the Missouri River, a vast source of recreation, fish and wildlife whose importance will broadly expand in the future. *See generally South Dakota v. Bourland*, 508 U.S. 679 (1993). The area is a prosperous, growing, and vital component of the state. Moreover, the 35,000 plus acres constitute a significant land area as to which there is an ongoing conflict between the state and federal courts, and which is important to the individual destinies of all those who live in or pass through the area.

3. The Practical Jurisdictional Consequences Are Important, Contrary to the Petitioners' Position

a. Jurisdictional Consequences With Regard to "Allotted Lands."

There is a major jurisdictional consequence with regard to *allotted lands*. Under the very language of 18 U.S.C. § 1151(c), "allotted" lands retain their "Indian country" status *only so long as* their "Indian title" has not been "extinguished." If the present-day "allotted lands" have "reservation" status under 18 U.S.C. § 1151(a), however, their "reservation" status is presumably *permanent* because, as this Court has held, land on a "reservation" does not lose its "Indian country" status by virtue of a transfer. *Solem v. Bartlett*, 465 U.S. at 470.

Ironically, this jurisdictional result would be at odds with the jurisdictional result which has already been declared by the court of appeals to exist in this case – i.e., allotted lands which have been transferred from tribal members to nonmembers have been declared by the Eighth Circuit to have lost their "reservation" and "Indian country" status. App. 47. The creation of a new hybrid of lands is thus a matter of great importance both within the former Yankton reservation and nationally.

b. Jurisdictional Consequences With Regard to Trust Lands

A significant jurisdictional consequence would follow from a final declaration that trust lands in the former reservation area acquired under the Indian Reorganization Act of 1934 or otherwise have "reservation" status under 18 U.S.C. § 1151(a). Just three years ago, the Eighth Circuit held that merely taking land into trust does not make such land "Indian country," let alone reservation.

See United States v. Stands, 105 F.3d 1565, 1571-1572 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998); *but see United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, No. 99-1174 (May 15, 2000). The IRA itself provides in section 7, codified at 25 U.S.C. § 467, a means by which the Secretary can create a "reservation" from lands taken into trust, but there is not a scintilla of a suggestion that this process has been followed here.

Thus, the decision under review has the potential to take mere trust lands within the former reservation and invest them with "reservation" status with the far-ranging jurisdictional consequences which attach to such status, based apparently on the subjective factors the court of appeals employed below.

C. THE ISSUE IS RIPE FOR REVIEW

The United States insists that this Court should postpone review of this case to a potentially later date. This plea should be rejected. First, the court of appeals has entered a final determination that a "reservation" exists in some form at Yankton.[2] Nothing on remand can eliminate the core dispute between the Eighth Circuit and the South Dakota Supreme Court over the essential disestablishment question. Second, nothing on remand can change the fact that the Eighth Circuit has disregarded this Court's precedents to set up a new "ad hoc" system of determining disestablishment questions.

---

[2] Review of this determination is especially critical because it directly conflicts with this Court's holding that the "ceded" lands lost "reservation" status at the time of the 1894 Act. *See* State Pet. 20-22. The State also rejects the argument at Tribe Brief in Opp. 19 that the district court rulings with regard to "agency" lands have *res judicata* effect. The ruling of the court of appeals clearly controls. Moreover, the description of the district court's ruling at *id.* is without foundation.

Third, the remand portion of the Eighth Circuit's opinion is frankly incoherent. As the United States acknowledges, the court of appeals gave no rationale for its determination that the "agency lands" constitutes a reservation. *See* U.S. Brief in Opp. 20. Moreover, there is nothing in the decision of the court of appeals that gives guidance to the district court to determine whether other lands may, or may not, be "reservation" beyond the vague, ad hoc, approach the court itself adopted. As a result, the parties can be assured of many more years of litigation and, presumably, a further hearing before the same panel of the court of appeals and a further application to this Court.

All the while, however, the conflict with the South Dakota Supreme Court will exist, and will possibly be exacerbated, and jurisdiction over the lands in question (some 35,000 plus acres) will be unknown.[3]

CONCLUSION

This Court should grant the State's Petition for Writ of Certiorari.

Respectfully submitted,

MARK W. BARNETT
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
Counsel of Record
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

---

[3] In the alternative to plenary consideration, guidance by way of summary disposition may be appropriate as to this Petition.